



United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Metalcraft, Inc.--Costs

File: B-402181.3

Date: May 17, 2010

H. Todd Whay, Esq., The Whay Law Firm, for the protester.
Debra J. Talley, Esq., Department of the Army, for the agency.
Paula A. Williams, Esq., and Sharon L. Larkin, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

Request for recommendation that protest costs be reimbursed is denied where agency did not unduly delay taking corrective action in the face of a clearly meritorious protest.

DECISION

Metalcraft, Inc., of Baltimore, Maryland, requests that we recommend that the firm be reimbursed the reasonable costs of filing and pursuing its protest of the award of a contract to TAMOR S.M.R. Ltd., of Warren, Michigan, under request for proposals (RFP) No. W56HZV-08-R-0879, issued by the Department of the Army for portable fire extinguishers to be used on the Bradley Fighting Vehicle System.

We deny the request.

The RFP provided for award of a fixed-price, indefinite-delivery/indefinite-quantity contract for a base year with 3 option years, for a guaranteed minimum of 3,348 and a 5-year maximum quantity of 67,875 fire extinguishers. RFP at 4. The solicitation also included a first article test (FAT) requirement. Award was to be made to the responsible offeror that (1) submitted the lowest evaluated offer if award was based only on price, or on a best-value basis if factors in addition to price were identified elsewhere in the solicitation, and (2) submitted a proposal that met all material solicitation requirements. RFP at 58. Under the evaluation factors for award set forth in section M of the solicitation, price was the only factor identified. *Id.*

In response to the RFP, the Army received proposals from three offerors, including Metalcraft and TAMOR. Only the proposals submitted by Metalcraft and TAMOR

were evaluated, as the third offeror withdrew its proposal. Based on the evaluation, the agency concluded that TAMOR's 5-year total price of \$10,964,387.50 was the lowest-priced proposal, and the agency conducted a pre-award survey to determine TAMOR's responsibility. Upon completion of the survey, the agency made award to TAMOR on October 8, 2009, as the lowest-priced responsible offeror.

In its initial October 26 protest of the resulting award to TAMOR, Metalcraft alleged that the agency was required to consider offerors' past performance and quality assurance systems and make a best-value award determination, rather than make award based solely on price. Metalcraft also argued that the agency failed to consider price reductions it offered in connection with its request for FAT waiver and request for deviation from the packaging requirements. Metalcraft further asserted that the agency impermissibly held discussions only with the awardee.

On November 25, the Army filed a report responding to the protest allegations and defending the propriety of the award. On December 7, Metalcraft filed comments in response to the agency report, as well as a supplemental protest (B-402181.2). In its supplemental protest, Metalcraft added specificity to its previous challenge that the agency held discussions only with TAMOR, and it argued, among other things, that TAMOR was nonresponsible and ineligible for award due to its lack of financial capability. In addition, the protester maintained that the agency had impermissibly permitted TAMOR to revise its initial proposal—from performing the entire contract outside the United States to performing within the United States and Israel.

By letter dated January 4, 2010, the Army advised this Office that after reviewing Metalcraft's supplemental protest allegations it decided to take corrective action, stating that it would reevaluate proposals and make a new award determination, if necessary. On January 21, we dismissed the initial and supplemental protests in light of the agency's decision to take corrective action.

Metalcraft requests that our Office recommend that it be reimbursed the costs of filing and pursuing its protest. The protester argues that it is entitled to costs because the agency unduly delayed taking corrective action in the face of its clearly meritorious protests by taking corrective action after submission of the agency report in response to the initial protest. The Army responds that it did not take corrective action in response to the initial protest, but instead took action in response to the supplemental protest, which raised entirely different protest issues. Since the agency took corrective action before submitting a supplemental agency report, the agency states, Metalcraft is not entitled to recover its costs. Metalcraft replies that by challenging the agency's award decision, there is a nexus between its initial and supplemental protests which should have led to the decision to take corrective action prior to filing the agency report on the initial protest.

Our Office may recommend reimbursement of protest costs if we sustain a protest, or where the agency unduly delays taking corrective action in the face of a clearly meritorious protest. 4 C.F.R. § 21.8(d), (e) (2010). This does not mean that costs

should be reimbursed in every case where an agency decides to take corrective action; rather, we will recommend reimbursement only where an agency unduly delayed its decision to take corrective action in the face of a clearly meritorious protest. Takota Corp.--Costs, B-299600.2, Sept. 18, 2007, 2007 CPD ¶ 171 at 3. As a prerequisite to our recommending the reimbursement of costs where a protest has been settled by corrective action, not only must the protest have been meritorious, but it also must have been clearly meritorious--*i.e.*, not a close question, when a reasonable agency inquiry into the protester's allegations would reveal facts showing the absence of a defensible legal position. Yardney Tech. Prods., Inc., Mar. 28, 2006, 2006 CPD ¶ 65 at 4; Department of the Army--Recon., B-270860.5, July 18, 1996, 96-2 CPD ¶ 23 at 3. The mere fact that an agency decides to take corrective action does not necessarily establish that a protest is clearly meritorious. Yardney Tech. Prods., Inc., *supra*, at 4.

Here, based on the record presented (including the agency report and the protester's comments thereto), we cannot conclude that the initial protest was clearly meritorious. As the Army maintained in response to the initial protest, the solicitation permitted award based on price alone because evaluation of past performance was not applicable to this procurement and the quality assurance system described in the solicitation was a solicitation requirement--not an evaluation factor. Further, the agency argued, with regard to the evaluation of price proposals, even decreasing Metalcraft's overall total price to reflect the offered price reductions, TAMOR's overall total price was still lower; thus, there was no prejudice to Metalcraft. Based on the record here, and even resolving doubts in Metalcraft's favor, the issues presented here were indeed close questions.

Moreover, as the record indicates, the agency took corrective action before the due date for its supplemental agency report. So long as an agency takes corrective action before the due date for its report, our Office regards such action as prompt and will not recommend reimbursement of costs. The Sandi-Sterling Consortium--Costs, B-296246.2, Sept. 20, 2005, 2005 CPD ¶ 173 at 2-3; Envirosolve--Costs, B-294420.3, Feb. 17, 2005, 2005 CPD ¶ 35 at 3. We do not agree that the allegations raised in the supplemental protest were related to the initial protest such that the agency's investigation of the initial protest should have revealed the asserted evaluation flaws. Indeed, our Office required a separate report in response to the supplemental protest in recognition of the entirely different nature of the supplemental protest allegations. Thus, Metalcraft has not met the standard for demonstrating entitlement to protest costs as a result of its initial protest.

The request that we recommend reimbursement of protest costs is denied.

Lynn H. Gibson
Acting General Counsel